

**BEFORE THE SECRETARY OF STATE**

**STATE OF COLORADO**

**CASE NO. OS 2002-020**

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**ORDER GRANTING RESPONDENTS' MOTION TO DISMISS AND AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINT FILED BY JACK DARNELL REGARDING  
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART  
OF AMBER WONG HSU, HOWARD RICH, DENNIS POLHILL AND CHRIS BAKER,**

**Respondents.**

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This matter comes before the ALJ on Respondents' Motion to Dismiss. Having considered Respondents' motion, Complainant's answer brief and Respondents' reply brief, the ALJ grants the Motion to Dismiss for the reasons set forth below.

**NATURE AND STATUS OF PROCEEDING**

On September 23, 2002, Jack Darnell (Darnell or Complainant) filed a complaint with the Colorado Secretary of State, listing himself as "Complainant" and listing as "Respondents" Amber Wong Hsu, Howard Rich, Dennis Polhill and Chris Baker. The Complaint related to political mailings in connection with Darnell's candidacy in the Republican primary for State Representative for District 63. On September 25, 2002, Elizabeth Conley, Administrative Assistant to the Secretary of State responded by letter to Darnell, acknowledging receipt of the Complaint and requesting clarification because it was unclear whether Darnell was alleging a violation of the Fair Campaign Practices Act (FCPA). Ms. Conley enclosed a copy of the FCPA for Complainant's review.

On October 10, 2002, Darnell filed a "Supplement Report on complaint filed on Colorado At Its Best" in which Darnell asserted violations by Colorado At Its Best of the FCPA, Sections 1-45-105.3(8) and 1-45-108, and of Rule 26 (of the FCPA rules). Complainant asserted he believed that Colorado At Its Best was masquerading as an educational organization to circumvent the FCPA. Upon receipt of this clarification, the Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing pursuant to Section 1-45-111(2)(a), C.R.S. (2002) of the Act.

Subsequently, Respondents Hsu, Rich, Polhill and Baker jointly filed a Motion to Dismiss and supporting brief through their counsel, Paul Grant, Esq. Respondents assert the Complaint fails to state a claim of any violation under the FCPA and fails to allege any

individual act by any individual Respondent. Respondents asserted that the Complaint contains no averments of material fact relating to any specified act by any specified Respondent. Darnell's response brief asserts that Colorado At Its Best violated Rule 26 and Section 1-45-105.3 and 1-45-108 of the FCPA by registering with the Secretary of State as an educational committee and by failing to register as a political committee. He also asserts that the Respondents were named because they are officers of Colorado At Its Best and are "responsible for all actions by law for its Articles of Incorporation that has been filed with the Secretary of State for the State of Colorado." He further asserts that contrary to the stated purpose contained in its Articles of Incorporation, Colorado At Its Best" has an agenda of furthering the Candidate of there (*sic*) choice and therefore not acting truly as an educational organization."

In their reply, Respondents assert first that Complainant's allegation of a violation of Rule 26 is without merit because the rule is merely procedural in nature. With respect to the allegations of violations of Section 1-45-105.3 and 1-45-108, Respondents assert Darnell has failed to make any specific factual allegations or legal assertions concerning which subsections of those provisions are at issue. They also assert that Complainant has failed to deny his Complaint is deficient and has neither asserted any specific illegal acts on the part of Respondents nor explained why his failure to make such allegations does not render his Complaint fatally flawed.

## **DISCUSSION**

1. The FCPA, among other things, attempts to regulate campaign contributions from various entities (Section 1-45-105.3, C.R.S.) and to require disclosure and registration of various entities receiving campaign contributions and making campaign expenditures (Section 1-45-108, C.R.S.). In his answer brief (although not in his Complaint *per se*), Complainant asserts violations of these two sections of the FCPA by Respondents. He also asserts an unspecified violation of Rule 26 of the FCPA rules.

2. The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the statement of the claim for relief. *Dunlap v. Colorado Springs Cablevision, Inc.* 829 P.2d 1286 (Colo. 1992) ("*Dunlap*"). In passing on such a motion, the court must consider only those matters contained within the four corners of the complaint. *Kratzer v. Colorado Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000); *Dunlap, supra*. Thus, factual matters raised solely in argument are not properly considered in determining such a motion because they are not part of the complaint. In considering such a motion, the court must accept the material allegations contained in the complaint as true. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995) ("*Dean Witter*"). A dismissal for failure to state a claim is proper if it appears beyond doubt that the plaintiff can prove so set of facts in support of his claim which would entitle him to relief. *Teply v. Public Employees Retirement Association*, 955 P.2d 573, 578 (Colo. App. 1997).

3. In this case, Darnell asserts the four named Respondents violated the FCPA and Rule 26. However, he has alleged no specific acts by any Respondent. As a result,

there are no factual allegations in the Complaint to accept as true with respect to any of the named Respondents. Although in his answer brief Darnell alleged Colorado At Its Best improperly failed to register as a political committee in violation of the FCPA, he did not name Colorado At Its Best as a Respondent in his Complaint. In addition, Complainant has failed to allege that the four Respondents he did name engaged in any conduct or specific acts in violation of the FCPA.

In the absence of any specific allegations in the Complaint against any of the named Respondents, Darnell appears to rely solely on the Respondents' relationship with Colorado At Its Best to support of his assertion that Respondents have violated the FCPA and Rule 26. With respect to the named Respondents, Complainant appears to imply in his answer brief that Respondents, as officers of Colorado At Its Best,<sup>1</sup> are responsible for all of the actions of Colorado At Its Best, based solely on their alleged status as corporate officers. However, the Complainant has failed to support this assertion with any legal authority and the ALJ is aware of none. See, e.g., Sections 7-108-402(2) and 7-128-402(2), C.R.S. (corporate officers and directors are not personally liable for torts committed by the corporation independent of the corporate officer's own wrongdoing).

4. The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of plaintiff's claims. A complaint should not be dismissed on motion for failure to state a claim so long as the pleader is entitled to some relief upon any theory of the law. *Dean Witter, supra*. Because Darnell's Complaint fails to allege any facts which, if established as true, would constitute a violation of the FCPA or Rule 26 as against any of the four named Respondents and because Darnell has failed to provide any legal support for his assertion that Respondents are liable for the acts of Colorado At Its Best based solely on their alleged status as corporate officers, Darnell has failed to state a claim upon which relief can be granted. Therefore, this matter should be dismissed as to all named Respondents.<sup>2</sup>

### **ORDER AND AGENCY DECISION**

Respondents' Motion to Dismiss for failure to state a claim is granted. This matter is dismissed and hearing on the merits scheduled for January 15, 2003 is vacated.

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<sup>1</sup> The Complaint does not actually allege that Respondents are officers of Colorado At Its Best. This assertion appears for the first time in Darnell's answer brief.

<sup>2</sup> Although Complainant has also alleged Colorado At Its Best improperly failed to register as a political committee in violation of the FCPA, Complainant has never named Colorado At Its Best as a Respondent and that entity has never been served with the Complaint. Thus, the fact that Darnell potentially may have a claim against this non-party has no bearing on whether Complainant has stated a claim against Respondents.

DONE AND SIGNED  
September \_\_\_\_, 2003

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JUDITH F. SCHULMAN  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above **ORDER GRANTING RESPONDENTS' MOTION TO DISMISS AND AGENCY DECISION** was served by facsimile transmission to: Paul Grant, Esq., Attorney for Respondents, (303) 741-5619; and was also served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to: Jack Darnell, 404 Hickory St., Ft. Morgan, CO 80701, and to Paul Grant, Esq., 6426 S. Quebec St., Englewood, CO 80111 on this \_\_\_\_ day of January, 2003.

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Secretary to Administrative Law Judge

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